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NO. 87-951

IN THE

Supreme Court of the United States

October Term, 1987

CURT DOUGLAS ABBOTT,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LINLEY E. PEARSON
Attorney General of Indiana
WILLIAM E. DAILY
Deputy Attorney General
AMY SCHAEFFER GOOD
Deputy Attorney General
Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6230
Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46206

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner was denied his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment and whether Petitioner was denied his Sixth Amendment right to a jury trial when the trial court failed to include two of Petitioner's proposed jury instructions.

II. Whether Petitioner was denied his Sixth Amendment right to counsel when the Petitioner volunteered statements following an admonition by the Petitioner's attorney to the police not to question the Petitioner.

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Appellate Court of Indiana, thereby refusing to review the decision entered by the Court in Cause No. 45A03-8609-CR-259 on February 19, 1987.

OPINION BELOW

The Supreme Court of Indiana, without issuing an opinion, denied transfer on September 24, 1987 and this denial may be found at page 12a of Petitioner's Appendix. That denial had the

effect of letting stand the earlier memorandum decision of the Court of Appeals of Indiana which is not reported and may be found at page 1a of Petitioner's Appendix.

STATEMENT OF THE CASE

During the night of September 16, 1985, the 1983 Chevrolet Impala belonging to John Goulding was stolen from where it was parked outside his residence in Chicago, Illinois (R.169-170). The Cook County Sheriff's Department was alerted and Officer O'Dea located the vehicle parked on a street in Calumet City (R.176). A surveillance team was set up to watch and follow the vehicle (R.176-177). After about five hours, several people came out and got into three different vehicles, including the Impala, and drove off, with the Sheriff's deputies following (R.177-178). The Impala and also a Thunderbird stayed together and eventually ended up outside the Petitioner's residence at 1434 Greenwood Drive in Dyer, Indiana (R.178-179). The driver of the Impala went into the residence for a few minutes then came outside and waved to the driver of the Impala to drive it into the backyard (R.178-179). The Petitioner did inspect the Impala and saw that the driver's window was broken out and that the steering column had been broken, or "peeled," so as to expose the ignition wires (R.197, 269).

The Dyer Police Department was alerted to the scene by the Cook County Sheriff's deputies. They took control of the situation and took the Defendant and two other men into custody (R.183, 186). The Petitioner phoned his attorney from his home and the attorney advised him not to sign a statement (R.128). Officer Copelin advised the Petitioner of his *Miranda* rights and transported him the one or two miles to the police station (R.198). During the short journey, the Petitioner initiated conversation asking things like what was going to happen to him, stating that it was the first time he was involved in anything like this and also stating words to the effect that he knew the vehicle was stolen (R.198-200, 204-205). These volunteered statements made by the Petitioner were admitted at trial without any objection being interposed by the Petitioner

(R.198-200, 203-205). The admission of these oral statements into evidence was not presented as an issue on the Defendant's appeal of the conviction to the Appellate Court of Indiana (Petitioner's Appendix at pp. 1a-11a).

The Defendant was aware when the Impala was delivered to him that it was being delivered without the proper paperwork, *i.e.* no title (R.269). He maintained at trial he believed the vehicle was legitimate notwithstanding the fact it was delivered to him by a man with whom he had previously had dealings and knew of his dishonesty (regarding bounced checks), that the window was smashed and the steering column broken to permit "hot wiring" of the vehicle, and the vehicle was without its paperwork (R.269).

SUMMARY OF THE ARGUMENT

I. Petitioner has failed to show that the refusal of his two final instructions presents a federal question. In fact, the decision of the Appellate Court of Indiana on this issue was in accordance with Indiana precedent which provides that refusal of instructions is harmless where their substance is covered by others given by the court.

II. Petitioner did not raise Sixth Amendment "right to counsel" issues in the Appellate Court of Indiana and these issues should not be determined at this stage, since they were not "pressed or passed upon" below.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO PRESENT A FEDERAL QUESTION REGARDING THE REFUSAL OF TWO FINAL INSTRUCTIONS

Petitioner contends he was denied due process as guaranteed by the Fourteenth Amendment and was denied his Sixth Amendment right to a jury trial when the trial court failed to give two of Petitioner's requested final instructions. One of

these refused instructions concerned the defense of "mistake of fact" and the other one concerned the determination by the jury of whether the Petitioner had confessed. Respondent respectfully contends that Petitioner's issues here were determined by the Appellate Court of Indiana based on valid Indiana case law which holds that refusal of instructions is harmless where their subject matter is adequately covered by others given by the court. *Warren v. State*, Ind., 470 N.E.2d 342 (1984).

In fact, Petitioner's argument to the Appellate Court and Supreme Court of Indiana was based upon state-law interpretation of the necessity of giving certain instructions and he never alleged, until now, that a federal constitutional or statutory provision was violated by the trial court's refusal of the two instructions. Therefore, appellate jurisdiction must fail here. *See Illinois v. Gates*, *infra*.

It is Respondent's position that Petitioner's reliance in his Petition for Writ of Certiorari on *Taylor v. Kentucky*, *Carter v. Kentucky* and *Duncan v. Louisiana*[1] is misplaced in that these cases are clearly distinguishable from the facts of this case and are not controlling. *Taylor* concerns the refusal by the trial court to give an instruction on the "presumption of innocence" and no other instruction given could conceivably suffice to convey to the jury this undoubted, elementary and axiomatic principle of law the enforcement of which "lies at the very foundation of the administration of our criminal law." *Taylor*, 436 U.S. at 483, 98 S.Ct. at 1933. *Carter* concerned the trial court's refusal of an instruction which would have charged the jury it could make no adverse inference of any kind from the defendant's exercise of his privilege not to testify. This Court held that the Fifth Amendment right against self-incrimination and the further constitutional guarantee that "no adverse

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[1] *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

inference" be drawn from the exercise of that right are so very basic to our Constitution, it is error to refuse such an instruction when one is properly tendered and no other instruction, *e.g.* one on the presumption of innocence, can take its place. In the case at bar, the instructions at issue concern the Indiana statutory defense of "mistake of fact" which is set out in Indiana Code 35-41-3-7,[2] and the jury's duty to determine whether the statements made by Petitioner constituted a "confession." These areas of law are not of such basic constitutional principles as to mandate the instructions proposed by Petitioner be given in the exact language as proposed by Petitioner. Other instructions given by the court in this case adequately covered the subject matter of these two instructions and sufficiently charged the jury with the law in order to enable them to render a valid verdict. As noted by the Appellate Court of Indiana in its memorandum decision in this case:

> However, the Supreme Court in *Warren* also determined that it was not reversible error for the trial court to refuse a tendered instruction when the subject matter of the instruction is covered by other instructions given by the court. 470 NE 2d at 344. In *Warren*, the trial court properly charged the jury with all of the elements for each crime involved, including a lack of consent element. 470 NE 2d at 344. Therefore no error was found in the trial court's refusal to give a tendered instruction specifically on lack of consent. 470 NE 2d 344. This *Warren* rationale controls the outcome of Abbott's allegation of error because the trial court here properly charged the jury with all of the elements of the crime of theft in its final Instruction No. 2. These elements include the requirements that Abbott acted "knowingly or intentionally" and "with intent to deprive" the rightful owner of the auto-

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[2] I.C. 35-41-3-7 Mistake of fact

Sec. 7. It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.

> mobile's use. This instruction covers the subject matter of the mistake of fact defense, because it is clear from the instruction given that Abbott could not have acted with the requisite knowledge or intent in order to be convicted of theft if he mistakenly believed the automobile was not stolen.

(See Petitioner's Appendix, at pp. 5a-6a).

The Appellate Court of Indiana also properly determined that another instruction given by the court which stated in part "an oral statement which *purports* to be the voluntary admission of the defendant" coupled with the instruction that the jury was to be the exclusive judge of the evidence and the credibility of the witnesses, adequately covered the same subject as Petitioner's refused instruction on the determination by the juror's of whether the defendant had confessed. The court held:

> The trial court's instruction regarding a 'purported' admission properly leaves the question of fact as to whether the admission existed to the jury. This instruction, coupled with final Instruction No. 10 informing the jury that it was the exclusive judge of the evidence and the credibility of the witnesses, covered the same subject matter as Abbott's tendered instruction. The trial court thus committed no error in refusing Abbott's tendered instruction. *See, Warren, supra.*

(See Petitioner's Appendix, at p. 7a).

Petitioner's reliance on *Duncan, supra,* is even more misplaced than the previously discussed *Taylor* and *Carter* in that *Duncan* concerned a person charged with misdemeanor offenses right to a trial by jury. Petitioner here had a jury trial and that jury was properly charged with all the law necessary for it to render a valid verdict.

Respondent would add, in conclusion, that as argued by the Respondent in the Appellate Court of Indiana, Petitioner waived any error on appeal regarding the refusal of these instructions in that the record on appeal did not contain the instructions he allegedly tendered. The failure to tender

instructions in writing constitutes a waiver of the right to challenge on appeal a trial court's refusal to give the instructions to the jury. *Anderson v. State*, Ind., 469 N.E.2d 1166 (1985); *Cox v. State*, Ind., 475 N.E.2d 664 (1985). Petitioner's failure here to tender these instructions or, if the record on appeal was simply not complete, his failure to provide an adequate and complete record on appeal had waived the issue with respect to these instructions.

The Appellate Court of Indiana in all respects acted properly in deciding these instructions issues against Petitioner and in no way was Petitioner deprived of a fair trial, due process or of a jury trial.

II.

THE ISSUE CONCERNING THE ADMISSIBILITY OF PETITIONER'S CUSTODIAL STATEMENTS IS NOT PROPERLY BEFORE THE UNITED STATES SUPREME COURT IN THAT PETITIONER DID NOT PRESENT THE QUESTION TO THE APPELLATE COURT OF INDIANA

Petitioner contends his custodial statements made to the police should not have been admitted into evidence by the trial court. Although Petitioner had made a pre-trial motion to suppress his statements, he never objected to the admission of the statements at trial, and never raised the issue of their admissibility on appeal to the Appellate Courts of Indiana. The Respondent therefore respectfully contends that Petitioner has made no federal claim and his Petition for Writ of Certiorari must be denied either on the basis of failure of jurisdiction or for failing to meet this court's prudential requirement that a federal basis exist that was pressed and passed upon below. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970). The so-called "not pressed or passed upon below" rule was recently restated in *Illinois v. Gates*: Due regard for the appropriate relationship of this Court to state

courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials. 462 U.S. at 221, 103 S.Ct. at 2323. Petitioner did not press this claim of denial of right to counsel as prohibiting the admissibility of his custodial statements, nor, consequently, have the courts of Indiana, passed upon it. Therefore, this Court should decline to consider relief on this basis.

In addition, Respondent would respectfully maintain the record does show Petitioner's custodial statements were made voluntarily to the police and were not the result of any interrogation. Any statement made by an accused freely, voluntarily, and without any compelling influence is admissible into evidence.

> The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478, 86 S.Ct., at 1630.

Rhode Island v. Innis, 446 U.S. 291 at 301, 100 S.Ct. 1682 at 1689, 64 L.Ed.2d 297 (1986), quoting from *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Petitioner here had been read his *Miranda* rights and been warned by his attorney to make no or to sign no statements. In the squad car on the way to the station house, Petitioner volunteered statements concerning what was to happen to him, that this was the first time anything like this had happened to him and that he knew the Impala had been stolen (R.198-200, 204-205). These volunteered statements do not come under the protection of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

AMY SCHAEFFER GOOD
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6230

Attorneys for Respondent